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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROY MILLS CUPIS, Defendant and Appellant.	A124482 (San Mateo County Super. Ct. No. SC016831

Almost 23 years after entering a no contest plea, defendant Roy Mills Cupis moved in San Mateo County Superior Court to withdraw his plea because he purportedly was not advised beforehand about the possible consequences to his immigration status, in violation of Penal Code section 1016.5 (section 1016.5). He appeals from the trial court's order denying his motion. We affirm the order.

BACKGROUND

On November 10, 1986, in open court, defendant entered his plea of no contest[1] to possession for sale of a controlled substance, cocaine, in violation of Health and Safety Code section 11351, resulting in his conviction and sentence to probation and a jail

[1] Defendant's 2009 motion to withdraw his plea refers to his entering a no contest plea, his declaration in support of that motion refers to his entering a guilty plea, and his appellate opening brief refers to his entering a guilty plea. The record of the 1986 plea proceeding indicates he entered a no contest plea.

commitment of 120 days. In January 2009, he moved to withdraw this plea, claiming that he had not been advised as required by section 1016.5.

Defendant relied primarily on his own declaration to support his motion. He declared that at the time of his conviction, he was "an undocumented immigrant" to the United States, that he did not remember whether his attorney asked him about his immigration status, that he remembered that his attorney did not advise him "of the immigration consequence associated with a plea of guilty," and that, had he known when he pled guilty that doing so would prevent him from ever becoming a United States citizen, he "would not have accepted the plea" and would have gone to trial.

Defendant acknowledged that he signed a Spanish language advisement of rights and plea form when he entered his 1986 plea. He declared, however, that "my first language is English and it is the language I am most comfortable in," that he never read the plea form, and that the handwriting on the form, other than his signature, was not his writing.

Defendant further declared that his mother had told him that she had secured citizenship for him and had given him a social security card, but that he lost it in 1990 and found that he could not replace it, at which point he began the process of becoming a United States citizen during an amnesty period for illegal immigrants. In the course of doing so, he sought legal advice about his criminal convictions and immigration status from 1992 to 2005 from eight to ten attorneys who thought nothing could be done before hiring his present counsel, and spoke to approximately one attorney per year about withdrawing his 1986 plea.

Defendant states in his opening appellate brief that he "filled out an advisement of rights form" and does not contest that it included in Spanish an explanation of possible immigration consequences from the plea. This form, filed with the court on November 10, 1986, is contained in the record, and was included among documents of which the trial court took judicial notice. Defendant points out that, while instructions on the form call for an English version of the form to be stapled to it, the form does not have an

English version attached to it. The form does include in English a signed attorney advisement paragraph, dated November 10, 1986, which states: "Ed Rojas [written in by hand] states that he is the above-named defendant's attorney in the above-entitled action; he personally read and explained the contents of the above declaration to the defendant; he personally observed the defendant fill in, date and sign said declaration; he, after having investigated this case and the possible defenses thereto, concurs in defendant's plea(s) of guilty or nolo contendre to the charge(s) as set forth by the defendant in the above declaration and stipulates there is a factual basis for the plea."

The form also contains signed findings and an order of the court, which states that defendant entered his plea in open court personally and by his attorney, that defendant was "advised as to his rights," and that the court found that defendant "made a knowing, intelligent and voluntary waiver of the above rights."

The record does not contain a transcript of the 1986 plea proceedings. However, the minutes of those proceedings state that an "English/Spanish interpreter," Silvia Lucero, was present, and a transcript of an earlier preliminary hearing indicates that defendant was "present in custody with the service of Anna Matinez, certified court interpreter." The minutes of the plea hearing also state that defendant was "not to return to the [United States] unless by legal means."

The San Mateo County District Attorney opposed defendant's motion to withdraw his plea. The district attorney argued that the plea form showed unequivocally that defendant was properly advised pursuant to section 1016.5, and that defendant had not put forward any credible evidence to the contrary. Among other things, the district attorney introduced records which showed that in 1995, defendant appeared in a criminal matter at which a Spanish language interpreter was also present.

The court ruled as follows: "It appears all three immigration consequences were listed on the plea form and the waiver and plea form and defendant signed the form. The form is also signed by the attorney for [defendant] Mr. Rojas.

"The plea and waiver form seems to be validly executed upon my examination. And there's nothing to indicate that on November 10 of 1986 in the docket that [defendant] was having trouble understanding the proceedings. It's clear that Health and Safety Code section 11351 is a deportable offense, but it appears the proper advisements were given and also in two other cases that the court has taken judicial notice of. . . .

"[Defendant] entered pleas of guilty or no contest to Health and Safety Code section 11350 and those plea forms also have all three immigration consequences listed.

"It also appears that one of the conditions of probation in case C16831 was that [defendant] not return to the United States except by legal means. And this would seem to reaffirm that—or would call into question the credibility of [defendant's] statement that Mr. Rojas did not advise him of the immigration consequences of his plea because since it appears he was going to be deported.

"And also it appears from the moving papers that there was not due diligence by [defendant] in making this motion because of the amount of time that has gone by since the pleas were entered.

"So the court finds that the defense did not meet its burden of proof. And although the record does establish defendant was given the required immigration consequences, advisements. The court also finds that the factual allegations is relevant to his burden of filing this motion with due diligence are suspect."

Defendant subsequently filed a timely notice of appeal.

DISCUSSION

Defendant argues that the trial court erred when it denied his motion to withdraw his plea because the record does not demonstrate that he was properly informed of its consequences pursuant to section 1016.5, subdivision (a). We disagree.

A. *Governing Law*

Section 1016.5, subdivision (a), states that "[p]rior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law . . . the court shall administer the following advisement on the record to the defendant: [¶] If

you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (§ 1016.5, subd. (a).)

In his opening brief, defendant does not address the standards he must meet to prevail on his motion or address our standard of review. As the People point out, "[t]o prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement." (*People v. Totari* (2002) 28 Cal.4th 876, 884.)

"[T]he trial court may properly consider the defendant's delay in making his application, and if 'considerable time' has elapsed between the guilty plea and the motion to withdraw the plea, the burden is on the defendant to explain and justify the delay." (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1618-1619 (*Castaneda*); see also *People v. Totari* (2003) 111 Cal.App.4th 1202, 1206-1207 (*Totari*) ["the rules for writs of *coram nobis*, including the burden on a defendant to prove reasonable diligence, *do* apply to defendant's motion to vacate his convictions under section 1016.5"].) Thus, while there is no time bar to a section 1016.5 motion (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 203-204), a defendant must establish that he or she acted with "reasonable diligence." (*Castaneda*, at p. 1619; *Totari*, at pp. 1206-1207.)[2]

[2] In his reply brief, defendant argues that the government had the burden of proving unreasonable delay based on the discussion by our Supreme Court in *Zamudio*, *supra*, 23 Cal.4th at pages 203-204. However, *Zamudio* only shifts the burden to the government to establish the defense of laches (*id*. at p. 204), which is not at issue here. Indeed, as discussed in *Totari*, *supra*, 111 Cal.App.4th 1202, the *Zamudio* court, while acknowledging, but not determining the correctness of, the analysis in *Castenada*, "strongly implied" that the issues of "reasonable diligence" and laches "were separate

We review the trial court's denial of defendant's motion for abuse of discretion. (*Zamudio, supra*, 23 Cal.4th at p. 192.) We apply the substantial evidence standard of review to its evidentiary rulings. (*People v. Quesada* (1991) 230 Cal.App.3d 525, 531.)

B. *Sufficient Advisement*

Defendant does not contest that the form he signed in 1986 contained a statement satisfying the section 1016.5 advisement requirement, albeit written in Spanish. Instead, he contends that "[t]he record of the plea does not show that [defendant] was fluent in Spanish or that an interpreter explained this advisement to him in English. Absent such a showing, [defendant] was not given the required immigration advisement within the meaning of section 1016.5." Defendant also contends that even if he did read Spanish, he was entitled to the effective assistance of his counsel at the time of the plea, but that there was no indication that his defense counsel was bilingual, or even that counsel signed the defense counsel certificate on the form. Defendant's arguments lack merit.

A proper written advisement in a plea form is sufficient to comply with section 1016.5's requirements. (*People v. Ramirez* (1999) 71 Cal.App.4th 519, 521-523.) "So long as the advisements are given, the language of the advisements appears in the record for appellate consideration of their adequacy, and the trial court satisfies itself that the defendant understood the advisements and had an opportunity to discuss the consequences with counsel, the legislative purpose of section 1016.5 is met." (*Id*. at p. 522.) The advisement need not be in the exact statutory language, but the defendant must be specifically advised of each of the three immigration consequences of his or her plea. (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 173-174.)

Defendant's argument is premised on contentions that are either unsupported or contradicted by the record. He first contends without any record support that "[w]hat apparently occurred at the plea hearing in 1986 is that the court personnel noticed that

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and distinguishable," and made clear by its indication that the "normal rules" apply to section 1016.5 motions that a defendant has the burden of showing reasonable diligence. (*Totari*, at pp. 1207-1208.)

appellant was ethnically Hispanic or Mexican, assumed he needed a Spanish language advisement form, and provided him" with one, without an accompanying English version. However, it can be reasonably inferred from the presence of an English/Spanish interpreter at the plea hearing, an interpreter at the preceding preliminary hearing, and an interpreter at the 1995 hearing in another matter that defendant *did* understand Spanish.

Defendant further contends that "[t]here is nothing in the record of the 1986 proceedings showing that [defendant] was fluent in the Spanish language[.]" Defendant also contends in his opening brief that he declared below in support of his motion that he "could not or did not read the advisement form." In fact, his declaration does not say he "could not" read the form, only that he did not read it. Defendant also does not declare that he could not read Spanish, only that English was his first language and "the language I am most comfortable in." The presence of interpreters at two hearings on this matter, as well as in a matter in 1995, contradicts the argument that defendant did not understand Spanish. Furthermore, the court could reasonably believe that defendant, having executed the form, understood its contents and read it.

Defendant concedes that the form contained a signed defense counsel certificate which states that his counsel, Rojas, " 'personally read and explained the contents' " of the form to him. Nonetheless, defendant contends that "defense counsel could only read and explain an exclusively Spanish language advisement form to a defendant if he is fluent in both Spanish and English," and that nothing in the record indicates that Rojas was fluent in Spanish, nor that any interpreter certified that he or she assisted in translating a dual-language form to both defendant and his counsel. This argument is unpersuasive. Rojas executed a certificate stating that he personally read and explained the contents of this Spanish language form to defendant, and the trial court could rely on this as evidence that defendant was sufficiently advised by him.

Perhaps anticipating this conclusion, defendant further argues that Rojas did not sign the form, based on defendant's own belief that the counsel certificate signature, which is not a model of outstanding penmanship, appears to state "Sherel Ann," and

claims that it is a "mystery" who signed the counsel certificate. There is no evidence that the signature was that of anyone other than his counsel, "Edward Rojas," and we do not agree that it appears to be someone else's signature. It also can reasonably be inferred from the circumstances that Rojas signed the certificate, given that the record indicates he was present at the November 10, 1986 plea hearing, that the signature blocks for defendant and his counsel were dated for that same day, that the court signed the findings and order section on the form indicating that defendant had been properly advised of his rights on that same day, and that the form was filed with the court on that same day. Substantial evidence supports the conclusion that Rojas signed the certificate.

Defendant also contends that his counsel did not explain the possible immigration consequences of his plea to him in 1986, as he stated in his declaration. The trial court expressly questioned defendant's credibility on this issue. "In determining whether the statutory grounds are present, the trial court on a contested motion to withdraw a plea of guilty under [section 1016.5] . . . is the trier of fact and hence the judge of the credibility of the witnesses or affiants." (*People v. Quesada*, *supra*, 230 Cal.App.3d at p. 533.) Therefore, we defer to the court's skepticism about defendant's credibility. The court also indicated in its ruling that the statement in the hearing minutes that defendant should "not return to the United States unless by legal means" was a further indication that he and his counsel considered the immigration consequences of his plea. We think the court could reasonably infer such a conclusion.

In short, defendant's contentions are contradicted by substantial evidence that the form contained the required section 1016.5 advisement in Spanish, that defendant read and understood the form's contents, and that his counsel personally read and explained the form's contents to him. In light of this substantial evidence, defendant's contention that the trial court abused its discretion or otherwise erred in denying his motion cannot be maintained.

C. *Reasonable Diligence*

The court also did not abuse its discretion in finding that defendant failed to bring his motion with proper diligence, a second, independent ground for rejection of his appeal.

Defendant's declaration indicates that, at a minimum, he was aware of the impact of his 1986 conviction on his immigration status in 1992, when he contends he began seeking legal advice about his criminal convictions and immigration status. He claims that between 1992 and 2005, before hiring his counsel, he called and sought advice from eight to ten different attorneys about his criminal convictions and immigration status, and states that he spoke to approximately one attorney per year about the possibility of withdrawing his plea in this case.

The court properly rejected these contentions as establishing due diligence for two reasons. First, it found these contentions to be "suspect." Defendant gives us no reason to interfere with the trial court's finding, and we defer to it. (*People v. Quesada*, *supra*, 230 Cal.App.3d at p. 533.)

Second, assuming for the sake of argument that these contentions were credible, the plain import of defendant's declaration is that he was aware as of 1992 that his conviction affected his immigration status. While defendant argues that this did not mean he became aware in 1992 that his advisement in 1986 was insufficient, his own declaration states that he "spoke to approximately one different attorney a year regarding the possibility of withdrawing my plea in this criminal case[.]" The trial court could reasonably conclude that these sporadic talks with attorneys did not show reasonable diligence, particularly given the extraordinary passage of time.[3] Furthermore, defendant provides little, if any explanation, of his efforts between 2005 and his filing of the motion in January 2009. Therefore, the court did not abuse its discretion when it concluded that

[3] We note that "[t]he reason for requiring due diligence is obvious. Substantial prejudice to the People may result if the case must proceed to trial after a long delay." (*Castenada*, *supra*, 37 Cal.App.4th at p. 1618.)

defendant's summary of his efforts did not establish that he acted with reasonable diligence.[4]

DISPOSITION

The trial court's order is affirmed in its entirety.

_____
Lambden, J.

We concur:

_____
Kline, P.J.

_____
Richman, J.

[4] Given our conclusions, we do not address the other issues raised by the parties.